

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-F-21008

EAST WEST RESORT TRANSPORTATION, LLC, AND TMS, LLC, D/B/A
COLORADO MOUNTAIN EXPRESS — PETITION FOR DECLARATORY ORDER
— MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

Decided: April 8, 2005

On September 24, 2004, East West Resort Transportation, LLC, and TMS, LLC d/b/a Colorado Mountain Express, which do business under the single name of Colorado Mountain Express (CME) and will be referred to jointly as such here, filed with the Board, and served on the Colorado Public Utilities Commission (CPUC), a petition for a declaratory order. CME requests that a proceeding be instituted to determine whether 49 U.S.C. 14501(a) preempts CPUC from regulating the rates which CME may assess for scheduled, regular-route, intercity motor carrier transportation of passengers in Colorado. CME states that CPUC has commenced an enforcement action against CME, charging CME with having carried passengers on its vehicles at rates not on file with CPUC and having collected fares other than those prescribed by CPUC, in violation of Colorado law. CME claims that it is a motor carrier engaged in interstate commerce over its authorized routes, and therefore that section 14501(a) preempts CPUC from requiring CME to file its rates with the state or charge state-prescribed rates. On October 14, 2004, CPUC filed a petition to intervene and request for an order establishing a procedural schedule.

By decision served on March 21, 2005, the Board granted CPUC's petition to intervene and instituted a declaratory order proceeding. Replies are currently due on April 11, 2005.

On April 1, 2005, CPUC filed a motion for an extension of time in which to respond to issues raised by CME in its petition. CPUC indicates that additional time, 120 days from the date of this decision, is needed for the following reasons: (1) CPUC intends to conduct discovery so that it can challenge CME's allegations with verified statements; and (2) CPUC has limited resources in which to prepare its response in that an Assistant Attorney General who had been assigned to the case no longer works on matters involving CPUC and is not available to work on this matter.

On April 5, 2005, CME filed a reply in opposition to CPUC's extension request, arguing that CPUC has had sufficient time to conduct discovery during both this proceeding and a related enforcement action that CPUC commenced against CME, that

CME has been audited by CPUC, and that CME has made documents available to CPUC upon request, but CPUC never requested them. CME urges the Board to deny the extension request.

On April 6, 2005, CPUC filed a motion for leave to file a reply to CME's reply, concurrently with its reply, on the ground that the record is incomplete due to certain representations made in CME's reply. On the same day, CME filed a pleading seeking denial of CPUC's motion. Generally, under 49 CFR 1104.13(c), replies to replies are not permitted; however, such a reply to a reply can be allowed when good cause is shown. Here, CPUC has not shown good cause to allow the filing of a reply to a reply. Furthermore, given the nature of the resolution of this matter, a reply from CPUC is not necessary. Therefore, CPUC's motion for leave to file a reply to CME's reply will be denied.

Good cause does exist to extend the due date for CPUC's reply for 60 days, until June 10, 2005. CPUC has justified an extension of this duration. CME's rebuttal will be due 10 days after CPUC's reply, on June 20, 2005.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CPUC's motion for an extension of time is granted in part, as discussed in this decision.
2. The due date for filing a reply to CME's petition for declaratory order is extended to June 10, 2005.
3. CME's rebuttal statement is due by June 20, 2005.
4. CPUC's motion for leave to file a reply to CME's reply is denied.
5. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary